IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

JUDGMENT
IN

S.B. Criminal Appeal No.451/2002

Manohar Singh S/o Shri Bhairon Singh ...accused appellant
Versus
The State of Rajasthan through P.P. ...Respondent

Date of Judgment ::: March 6, 2006

PRESENT
Hon'ble Mr. Justice Narendra Kumar Jain

Shri Suresh Sahani with
Shri Sudhir Jain and
Shri R.M. Sharma and
Shri T.C. Sharma for accused appellant
Shri B.S. Chhaba, P.P., for the State

By the Court:-

The Sessions Judge, Ajmer, vide its judgment dated 7.1.2002 in Sessions Case No.23/2000, convicted and sentenced accused appellant Manohar Singh Son of Shri Bhairon Singh, under Section 8/18 of the N.D.P.S. Act, 1985 (for short, 'the Act') to ten years rigorous imprisonment and a fine of Rs.1,00,000/-; in default of payment of fine, to further undergo one year's rigorous imprisonment. Being aggrieved with the same, the accused appellant has preferred this appeal before this Court.

Briefly stated the facts relevant for

disposal of this appeal are that on 16.5.2000 Kesar Singh (PW-7), the S.H.O., Police Station Civil Lines, Ajmer, lodged First Information Report at Police Station Civil Lines, Ajmer, District Ajmer, wherein it was alleged that on that date at about 8.30 PM he was on petrolling duty at Ambedkar Circle near Bus Stand. One informer informed him that one person wearing trouser of green colour and shirt of cream colour, aged about 22-23 years, is standing at the Bus Stand with one bag wherein smell of opium is coming. He recorded the said information (Exhibit P-11) and sent a copy of the same to the Superintendent of Police, District Ajmer. Thereafter he called Surendra Singh, S.I., and Ramendra Singh, S.I., through wireless and reached at the Bus Stand. He saw one person standing at the Bus Stand as per the information given by the informant and on asking he disclosed his name as Manohar Singh. Thereafter a notice under Section 50 of the Act was given to Manohar Singh apprising him about his right to get himself examined either in presence of Magistrate or in presence of Gazetted Officer. The accused appellant gave in writing that he is ready for his search in presence of Gazetted Officer. The search was made in presence of two witnesses, namely, Mahboob Khan

(PW-1) and Rajesh Kumar (PW-2). 4 Kg. opium was found in the bag belonging to the accused. A sample of 100 gram was taken and sealed. The remaining contraband weighing 3 kg. and 900 gram was also sealed separately. After completion of investigation a charge-sheet was filed against the accused appellant for the offence under Section 8/18 of the Act.

The learned trial court framed charge against the accused appellant for the offence under Section 8/18 of the Act. The accused denied the charge and claimed to be tried.

The prosecution examined 10 witnesses and produced documentary evidence Exhibit P-1 to Exhibit P-22. Thereafter the statement of accused was recorded under Section 313 Cr.P.C. on 10.10.2001. The case was fixed for defence evidence and for final arguments on 23.10.2001. The arguments were heard on 7.12.2001 and the case was fixed for judgment on 18.12.2001. Thereafter on 7.1.2002 the statement of the accused was further recorded and on the same day the arguments were again heard and impugned judgment was pronounced.

The learned counsel for the accused appellant contended that the seized contraband article from the appellant was not produced in the court which is clear

from the evidence of the prosecution witnesses including the statement of PW-7 Kesar Singh, the recovery officer, as well as PW-5 Sameer Kumar Singh, Dy. S.P., therefore, it cannot be said that the seized article was the opium. He further contended that the F.S.L. Report was not tendered in evidence during the course of examination of the prosecution witnesses as there is no reference of F.S.L. Report in any of the statements of the prosecution witnesses and in absence of the F.S.L. Report it cannot be said that the seized article was opium and in these circumstances the conviction of the accused appellant is bad in law and he deserves to be acquitted. He also referred Rule 31 of the General Rules (Criminal), 1980 wherein it is provided that upon every document produced and admitted in evidence and proved before court shall be clearly marked the number it bears in the General Index of the case and the number and title of the case. The procedure has been laid down in Rule 31 as to how the documents and material exhibits admitted in evidence on behalf of the parties will be marked in the case. He further contended that contraband was alleged to have been recovered from Shawl and black bag but the same were not seized and exhibited in the case, therefore,

link evidence is missing in the case. He also pointed out overwriting in the timings mentioned in Exhibit P-2, which, in his submission, is not permissible as per the General Rules (Criminal). He also pointed out certain contradictions in respect of colour of trouser of the accused; that one witness of the prosecution says that the accused was wearing trouser of green colour whereas another says that the colour of trouser was black.

The learned Public Prosecutor appearing on behalf of the State of Rajasthan, contended that the learned trial court has considered the oral and documentary evidence available on the record and only thereafter convicted and sentenced the accused appellants. He contended that there is no illegality or perversity in the impugned judgment so as to interfere in it by this Court.

I have considered the submissions of the learned counsel for both the parties and examined the impugned judgment as well as the record of the trial court.

In Kabu @ Khudia Vs. State of Rajasthan, Cr.L.R. (Raj.) 1991 p.183, it has been held that production of seized article is necessary, so that,

their chemical report can be corroborated with the seized article, but the learned Public Prosecutor is unable to show any evidence on record and in view of the cases referred therein, the non-production of the case property 'Mal' in Court gives serious infirmity and doubt about the investigation.

In Prakash Singh Vs. State of Rajasthan, 2001 (1) RCC 197, this Court considered the earlier judgment in Kabu @ Khudia's case (supra) and other judgments and held that in absence of production of seized articles in court, it cannot be said that the case of the prosecution has been established beyond reasonable doubt and the accused in that case was acquitted only on this ground.

In Madan Vs. State of Rajasthan, 2001 (3) R.Cr.D. 150, this Court again considered the effect of non production of samples and articles in the Court during trial and it was held that the seized articles and report of the chemical examiner are absolutely necessary to be produced so the seized articles may be got identified before the court from the concerned witnesses as a substantive piece of evidence.

In Lekha Ram Vs. State of Rajasthan, 2004 WLC (Raj) (UC) 662, the Division Bench of this Court held that in case FSL report is not tendered in evidence

then recovery of article alone is not sufficient to sustain conviction.

In view of the above proposition of law I examine the evidence available on the record in the present case. From the statement of PW-1 to PW-10 it is not clear that the contraband seized vide Exhibit P-2 was produced in the court and the same was not got identified by any of the witnesses including independent witnesses PW-1 Mahaboob Khan and PW-2 Rajesh Kumar, and recovery officer PW-7 Kesar Singh. PW-7 Kesar Singh, in his statement before the Court, has not identified the contraband. There were two witnesses to recovery memo PW-1 Mahaboob Khan and PW-2 Rajesh Kumar and both have not identified the contraband in the Court.

I further find that F.S.L. Report (Exhibit P-22) dated 24.1.2001, an important and relevant document, was not tendered in evidence during the course of examination of prosecution witnesses. The F.S.L. Report dated 24.1.2001 was not produced in the court before 7.1.2002 i.e. the date of impugned judgment of the trial court. It is relevant to mention that the statement of the accused was recorded under Section 313 Cr.P.C. on 10.10.2001 and in view of the

fact that F.S.L. Report was not on the record, no question in this regard was put to the accused. Thereafter the case was finally heard by the trial court on 7.12.2001 and the case was fixed for judgment on 18.12.2001. The judgment was not pronounced on 18.12.2001 and it was adjourned for 21.12.2001. However, on that date also the judgment could not be pronounced and the case was again fixed for arguments on 2.1.2002. The case was again heard on 2.1.2002 and it was kept for judgment on 7.1.2002. It appears that on 7.1.2002 the learned trial court took the F.S.L. Report dated 24.1.2001 on the record and marked Exhibit P-22 on it. The order-sheet dated 7.1.2002 shows that there is no reference of taking this F.S.L. Report on the record and putting Exhibit P-22 on it. However, from the order-sheet, it appears that the statement of the accused was again taken under Section 313 Cr.P.C. on 7.1.2002 and from the statement it appears that a question was put to accused about F.S.L. Report (Exhibit P-22). It does not appear that a copy of the F.S.L. Report was made available to the accused. The arguments were heard and judgment was dictated and pronounced on 7.1.2002 itself and the accused was convicted and sentenced as stated above.

I further find that there were two independent witnesses in the present case, namely, PW-1 Mahaboob Khan and PW-2 Rajesh Kumar, and both these witnesses were declared hostile by the prosecution. From the cross-examination of PW-2 Rajesh Kumar it appears that he was holding the post of Home Guard meaning thereby he was Government servant but still he did not support the prosecution case and stated that one bag was lying at platform no.8 of the Roadways Bus Stand and the same was taken by him before the duty officer Bala Bux Tak. He further stated that he was not allowed to read any document by Investigating Officer and his signatures were taken at Police Station.

In view of the above discussion I find that neither the contraband was produced in the court nor it was got identified by the concerned witnesses. The FSL report was not tendered in evidence before 7.1.2002 whereas the first statement of the accused under Section 313 Cr.P.C. was recorded on 10.10.2001 and final arguments were heard in the case on 7.12.2001 and case was kept for judgment on 18.12.2001. From the order-sheet dated 7.1.2002 it appears that the statement of the accused was recorded and arguments were heard and the judgment was pronounced on the same

day. In the order-sheet dated 7.1.2002 there is no reference of taking FSL Report on the record and marking it as Exhibit P-22. In these circumstances it is clear that the prosecution failed to prove the case against the accused beyond reasonable doubt and accused is entitled to get the benefit of doubt. Apart from it, I further find that although there is a reference in the order-sheet dated 7.1.2002 of recording statement of the accused under Section 313 Cr.P.C. But thereafter the case should have been fixed for defence evidence but it was not fixed for defence evidence. There is no reference that the counsel for the accused did not want to produce any evidence in defence. In these circumstances it is clear that the trial court has not given a proper opportunity in the present case to the accused to defend his case and hence committed a serious illegality in convicting and sentencing the accused appellant under the impugned judgment. It was the duty of the trial court to fix the case for defence evidence even if the statement of the accused was again recorded under Section 313 Cr.P.C. The accused appellant is in jail for last about 5 years and 9 months, therefore, I do not consider it appropriate to remit the case back to the trial court at this stage

for giving opportunity to the accused to produce any defence evidence in the case.

In view of above discussion, I find that learned trial court has committed an illegality and wrongly convicted and sentenced the accused appellant under the impugned judgment, which cannot be allowed to be sustained.

Consequently the appeal is allowed. The impugned judgment passed by the learned trial court is set aside. The accused appellant is acquitted. He is in jail, therefore, it is directed that he may be set at liberty forthwith, if his custody is not required in any other case.

(Narendra Kumar Jain) J.

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